

In the Matter of:	:	
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Newton County Resource Council,	:	HUDBCA No. 05-A-CH-FF002
	:	
Petitioner	:	
	:	

**DECISION AND ORDER**

Petitioner was notified by a Due Process Notice that, pursuant to 31 U.S.C. §§ 3716 and 3720, the Secretary of the U.S. Department of Housing and Urban Development (“HUD”) intended to seek administrative offset of any federal payments due to Petitioner in satisfaction of a delinquent and legally enforceable debt allegedly owed to HUD.

Petitioner has made a timely request for a hearing concerning the existence, amount or enforceability of the debt allegedly owed to HUD. The administrative judges of this Board have been designated to conduct a hearing to determine whether the debt allegedly owed to HUD is legally enforceable. (24 C.F.R. § 17.152(c)). As a result of Petitioner’s request, referral of the debt to the Internal Revenue Service or to the U.S. Department of the Treasury for administrative offset was temporarily stayed by the Board.

**Statement of Facts**

“On September 26, 1995, HUD executed a \$556,500.00 Program grant agreement with Petitioner.” (Secretary’s Statement, hereinafter “Secy. Stat.,” Exh. A-1, Inspector General Audit Report, Audit Case Number 2001-FW-1005, p. 1). The agreement was funded under HUD’s Supportive Housing Program. (Secy. Stat., ¶ 2). The Newton County Housing Council (“Housing Council”), “a nonprofit membership-based organization formed in 1993 as a spin-off of Petitioner,” was a co-applicant of the Program grant. (Inspector General Audit Report, p. 3). “Under the 3-year grant, [Petitioner] would provide transitional housing and supportive services in the Newton County, Arkansas area.” (*Id.* at p. 1). “HUD provided funds to renovate a structure to be used by Harmony House, [Inc.] (“Harmony House”) for a battered women’s shelter and to purchase a van to transport homeless persons.” *Id.*

“On March 26, 1998, HUD executed a \$569,327 renewal of the Program grant agreement with [Petitioner] to continue to provide supportive housing and services to homeless persons in Newton County, Arkansas.” (Id. at p. 2). “HUD allocated \$567,937.00 to Petitioner for fiscal years 1999, 2000 and 2001, and paid \$385,452.00 to Petitioner under the terms of the grant agreement.” (Motion To Amend Secretary’s Statement That Petitioner’s Debt Is Past Due And Legally Enforceable, hereinafter “Mot. To Amend,” ¶ 2).

“On July 28, 1998, HUD approved the transfer of responsibility for administering the grant from Petitioner to Harmony House.” (Inspector General Audit Report, p. 2). “The Resource Council, Harmony House, and Housing Council executed a contract on July 20, 1998, detailing the transfer and Harmony House and Housing Council’s responsibilities under the grant.” Id. HUD was not a party to this contract. (See Letter from Petitioner, dated November 24, 2004, hereinafter “Pet. Nov. 24<sup>th</sup> Ltr.,” attached copy of contract dated July 20, 1998).

Between July 2000 and February 2001, D. Michael Beard, District Inspector General for Audit, performed an audit of the 1988 Supportive Housing Program of Harmony House, Inc., a non-profit entity with whom Petitioner had a contractual relationship. (Inspector General Audit Report, cover page). The audit covered Harmony House’s financial transactions for the period October 1, 1998 through July 17, 2000. Id. The report was issued on August 27, 2001. Id. The audit report states the following:

In response to an anonymous complaint, we performed an audit of the Harmony House, Incorporated (Harmony House) of Harrison, Arkansas. The complainant alleged Harmony House and Newton County Housing Council (Housing Council) used Supportive Housing Program (Program) funds more to support their agencies than to help the communities served by the grant. Specifically, the complaint alleged the Executive Director of Harmony House used the grant funds for inappropriate and ineligible costs but withdrew employment assistance from needy participants, and the Executive Director of Harmony House and the Director of Housing Council did not effectively utilize properties rented for transitional housing. Except for the withdrawing of employment assistance, the audit substantiated the allegations. With respect to the withdrawing of employment assistance, Harmony House paid Program funds to ineligible participants.

The Executive Director of Harmony House disregarded regulations and spent \$157,066 in unsupported and ineligible costs. Specifically, the Executive Director of Harmony House used \$114,005 of Program and other Harmony House funds for ineligible and unsupported costs

and paid \$43,061 for three persons that did not qualify for Program assistance.

The Harmony House Executive Director and the Director of Housing Council did not perform in accordance with the HUD-approved agreement. Either Harmony House and Housing Council had not provided transitional housing to qualified homeless persons, or there was not a significant demand for scattered site transitional housing for the homeless in the area covered by the Program grant. (Inspector General Audit Report, Executive Summary, p. iii).

### **Discussion**

The Secretary contends: (1) that “Petitioner did not use all the grant funds paid to it by HUD in accordance with the grant agreement, the regulations governing the Supportive Housing Program, or the Office of Management and Budget Circular A-122;” (2) that “Petitioner is liable for repayment of the amounts paid to it by HUD that it did not use for purposes of carrying out its agreement with HUD;” and (3) that “Petitioner is justly indebted to the Secretary in the amount of \$91,428.00 as the unpaid principal balance as of August 27, 2001.” (Secy. Stat., ¶¶ 4,7; Declaration of Mary Sally Matiella, ¶ 8). Petitioner contends that it does not owe the debt claimed by the Secretary and that “[t]he organization that was responsible for these funds, Harmony House, Inc.[,] is no longer in existence.” (Letter from Petitioner dated September 27, 2004). Petitioner also disputes the amount of the debt.

First, Petitioner claims that it is not liable for the debt “because [it] had no knowledge, authority, or control over any of [the] funds [that were distributed]. (Pet. Nov. 24<sup>th</sup> Ltr.). Petitioner states further that it “had a contract, approved by HUD, with Harmony House and the Newton County Housing Council [for other parties] to administer [the] grant ... [and Petitioner] never had any knowledge of anything concerning the grant from October 1, 1998 through the summer of 2000 when [Petitioner] became aware of the audit.” Id.

In Ronald G. Brauer, HUDBCA No. 99-C-CH-Y304 (1999), this Board held that:

An assignment of a contract, without more, is insufficient to release Petitioner from liability under the contract in the event of default or deficiency by the assuming parties. For Petitioner to prevail on its assertion, either (1) the lender would have had to release Petitioner in writing; (2) there would have been persuasive evidence of conduct by the creditor of an intent to release Petitioner of his obligation; or (3) the lender would have accepted legally sufficient consideration from Petitioner.

Similarly, Petitioner has not shown that it was released from its obligations to HUD under the terms of the Program grant agreement by submitting evidence which would prove that it has met any of the requisite criteria set forth in the Brauer case. Although HUD may have approved the transfer of responsibility for administering the grant from Petitioner to Harmony House, there is no evidence that HUD agreed to release Petitioner from liability for any breach of the terms of the Program grant agreement. Absent any evidence of a release, Petitioner remains legally obligated to fulfill its responsibilities under the terms of the Program grant agreement and its renewal.

While the Secretary has shown that Petitioner is in privity of contract with HUD, there is no evidence that Harmony House was a signatory to either the Program grant agreement or its renewal agreement. (See Secy. Stat. ¶ 2; Matiella Decl., ¶ 4; and Inspector General Audit Report). “Generally, the obligation of contracts is limited to the parties making them, and, ordinarily, only those who are parties to contracts are liable for their breach. Parties to a contract cannot thereby impose any liability on one who, under its terms, is a stranger to the contract....” 17A Am Jur 3d Contracts § 421, p. 446, citing, inter alia, Johnson v. Coleman, Ky., 288 SW2d 348 (1956); Mitchell v. Atlas Roofing Mfg. Co., 246 Miss 280, 149 So 2d 296 (1963). Clearly, HUD has the right to enforce the terms of the Program grant agreements against Petitioner. Although Petitioner may wish to pursue indemnification from Harmony House, its successor, from the Housing Council, or from responsible individuals in a state or local court for losses sustained due to any grant funds misused by Harmony House, Petitioner is primarily liable to HUD for any improper expenditures of grant funds.

Second, Petitioner contends that although “\$567,937.00 was the original amount of the renewal grant, ... much less was actually paid out because payments were suspended after the audit began.” (Letter from Petitioner dated March 9, 2005, hereinafter “Pet. Mar. 9<sup>th</sup> Ltr.”). Petitioner did not submit any evidence to show the exact amount of money received from HUD or “actually paid out.” The Secretary originally alleged that “HUD allocated \$567,937.00 to Petitioner for fiscal years 1999, 2000 and 2001[,] and paid that amount to Petitioner under the terms of the grant agreement.” (Secy. Stat., ¶¶ 2-3 citing Matiella Decl., ¶ 4). However, the Secretary subsequently amended this averment, and now contends that “HUD paid \$385,452.00 to Petitioner over the period beginning January 19, 1999 and ending September 20, 2000.” (Supplemental Statement That Petitioner’s Debt Is Past Due And Legally Enforceable, hereinafter “Secy. Supp. Stat.,” ¶ 5.). Petitioner does not contest the assertion made by the Secretary in his Supplemental Statement that HUD actually paid out \$385,452.00 from January 19, 1999 to September 20, 2002. Petitioner claims only that: “none of [the money allocated and paid out under the renewal grant agreement] was ever paid to the Newton County Resource Council; it was all paid to Harmony House[,] Inc. and the Newton County Housing Council per [their] contract with them to administer [the] grant.” (Pet. Mar. 9<sup>th</sup> Ltr.).

The Secretary’s Supplemental Statement, filed on July 20, 2005, includes the following:

1. Exhibit A, the letter to Petitioner dated February 15, 2001, from the HUD Arkansas State office, indicating that Petitioner was grantee and payee under grant number AR37B970401 and grant number R37B001001;
2. Exhibit B, a printout of payment information contained in HUD's Line of Credit Control System (a/k/a LOCS), a computerized record keeping system;
3. a representation of an employee of the HUD Office of the Chief Financial Officer that the printout lists payments by HUD under the terms of its grant agreement with Petitioner;
4. a representation that HUD uses LOCS to record and monitor disbursement of funds appropriated by Congress awarded to grantees by HUD pursuant to various statutes administered by HUD; and
5. a representation that Exhibit B indicates that HUD paid funds to the Petitioner by means of Automated Clearing House (ACH) transfers to Bank of the Ozarks Account No. 00099895.

(Secy. Supp. Stat., ¶¶ 1-5; Exh. A; Exh. B).

Although Petitioner claims that payments during all pertinent times under the grant agreement or renewal were not made directly it, Petitioner has submitted no documentary evidence to substantiate its claim that it did not receive funds disbursed by HUD and that HUD is not entitled to the reimbursement in the amount sought by HUD. Petitioner contends that the documents submitted by the Secretary "do not prove where the money was actually sent." (Letter from Petitioner dated August 10, 2005). However, Petitioner has failed to submit documentary evidence which proves that Harmony House, and not Petitioner, received grant money directly from HUD.

The Board notes that much of the evidence submitted by the Secretary in support of its claim is circumstantial, and, to a significant degree, deficient in probative value. The Secretary has submitted no documentary evidence which would show that sums allocated under the grant were actually received and deposited by Petitioner. The Secretary submitted, as Exhibit A attached to Secy. Supp. Stat., a letter dated February 15, 2001 from Anne Golnik, Director of HUD's Arkansas State Office of Community Planning and Development, to Jack Stewart, Chairman of the Board of the Newton County Resource Council, which denied Petitioner's request to have the official grantee for the grants changed from Newton County Resource Council to Harmony House. The letter stated that HUD would not change the grantee name, but the letter is not, pro se, evidence that grant funds were not paid to Harmony House. The Secretary's Exhibit B attached to Secy. Supp. Stat. is a copy of the "Line of Credit Control System (A67) Grant

Detail,” with five attached pages of a “Project Voucher Summary.” That exhibit lists the Newton County Resource Council as the contractual organization and as payee. It also lists the Bank of the Ozarks as the bank into which the funds were deposited. However, the exhibit does not identify the name of the account holder of the checking account at the Bank of the Ozarks into which the grant funds were allegedly deposited, nor does it indicate who had control over the funds in that account. Certainly, the Secretary could have supplied the Board with far more material, probative, and convincing documentary evidence in support of its contentions relating to these issues.

Despite these deficiencies in the Secretary’s documentary evidence, the burden of proof in administrative offset cases such as this requires that the debtor present “evidence that all or part of the debt is not past due or not legally enforceable . . . .” 24 C.F.R. §§ 17.152 (a) and (b). Petitioner has indisputably failed to carry its burden of proof because it has submitted no documentary evidence to show that funds were received directly by Harmony House and not by Petitioner, or that Petitioner was not the legal recipient of the grant funds at issue.

The Secretary contends that “Petitioner is justly indebted to the Secretary in the amount of \$91,428.00 as the unpaid principal balance as of August 27, 2001.” (Secy. Stat., ¶¶ 4,7; Declaration of Mary Sally Matiella, ¶ 8). Petitioner has failed to submit any documentary evidence which rebuts the Secretary’s proof or which would prove that Petitioner is not indebted to HUD in the amount claimed by the Secretary. Therefore, Petitioner’s claim that it does not owe this debt fails for lack of proof.

### **ORDER**

Upon due consideration of the entire record of this proceeding, I find that the claim which is the subject of this proceeding is legally enforceable against Petitioner in the amount of \$91,428.00.

The Order imposing the stay of referral of this matter to the Internal Revenue Service or to the U.S. Department of the Treasury for administrative offset is vacated. It is hereby **ORDERED** that the Secretary is authorized to seek collection of this outstanding obligation by means of administrative offset of any federal payments due to Petitioner.

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David T. Anderson  
Administrative Judge

September 16, 2005